relevance to the application by the plaintiffs for the injunctions which they seek against the defendants. The application for the interim injunctions is dismissed with costs.

Order accordingly.

Solicitors: *Shafee & Co.; Rashid & Lee.*

GOVERNMENT OF MALAYSIA v. CHONG WOO YIT

[A.C.J. (Wan Yahya J.) 2 March 1988]

[Malacca – Civil Suit No. 1441 of 1985]

Revenue Law – Additional income tax assessments made after a lapse of 12 years – Whether limitation provision in Income Tax Act 1967 contravened – Whether tax statute-barred – Income Tax Act 1967, s. 91 – Limitation Act 1953, s. 33.

The Inland Revenue Department ("the Revenue") made some additional assessments in respect of the appellant's income for the previous years of assessments. The additional assessments were made retrogressively, the last mentioned year being a period of 16 years and the first mentioned date going right back to about 26 years from the date on which the actual additional assessments were computed. The Revenue took out an application under Order 14 of the Rules of the High Court for summary judgment for the recovery of these additional assessments. The senior assistant registrar granted summary judgment against the appellant. The appellant appealed against this decision to the High Court.

The appellant contended that: (a) the additional assessments made after the lapse of 12 years contravene the limitation period as contained in section 91 of the Income Tax Act 1967 and is therefore statute-barred; (b) summary judgment is not available to the Revenue in this instance because its claim is based on the allegation of fraud.

Held, dismissing the appeal: (1) the Revenue action under section 91 of the Income Tax Act 1967 can go beyond any period of limitation by virtue of section 33 of the Limitation Act 1953 and, alternatively, they can do likewise under section 91(1) and (2) on the basis of wilful default and negligence or by establishing fraud to postpone limitation;

(2) the word "fraud" did not appear in the Revenue's statement of claim nor in any of the supporting affidavits filed in the Order 14 application. It is obvious from the words used in the statement of claim that the claim was based on "negligence" under section 91(3)(b) and not fraud.

Case referred to:

(1) *Arumugam Pillai* v. *Government of Malaysia* [1976] 2 M.L.J. 72 (folld).

APPEAL FROM REGISTRAR'S DECISION.

Chong Kim Kong for the appellant/defendant.

Shaharuddin Ali (Senior Federal Counsel) for the respondent/plaintiff.

Cur. Adv. Vult.

Wan Yahya J.: The facts leading to this appeal may be shortly summarized as follows. On 16 March 1985, the Inland Revenue Department ("the Revenue") made additional assessments in respect of the appellant's (taxpayer) income for the previous years of assessments for the following amounts:

Year of Assessment 1959 for additional tax of	$20.04
Year of Assessment 1961 for additional tax of	$15,301.60
Year of Assessment 1963 for additional tax of	$1,831.95
Year of Assessment 1964 for additional tax of	$4,538.70
Year of Assessment 1965 for additional tax of	$7,054.00
Year of Assessment 1966 for additional tax of	$62,276.50
Year of Assessment 1968 for additional tax of	$8,329.75
Total	$99,352.54

It is notable from the above that the additional assessments were made retrogressively, the last mentioned year being a period of 16 years and the first mentioned date going right back to about 26 years from the date on which the actual additional assessments were computed. Notices of the assessments were posted to the appellant on the same date. On 21 December 1985, the Revenue took out a writ of summons against the taxpayer for a sum, which after the addition of penalties for late payments, amounted to $114,749.03.

On 3 November 1986, the Revenue filed a summons-in-chambers for an application under Order 14 for a sum of $112,035.70, being the amount claimed in the writ less $2,713.33 paid by the taxpayer during the intervening period.

After hearing the matter in chambers, the learned senior assistant registrar entered summary judgment for the amount claimed by the Revenue. The taxpayer appealed against that decision.

Substantially the same arguments as raised before the learned senior assistant registrar have been placed before me. Mr. Chong, for the taxpayer, contends that such additional assessments made after the lapse of 12 years contravene the limitation as contained in section 91 of the Income Tax Act and are, therefore, statute-barred. Second-

ly, he argues that the summary judgment under Order 14 of the Rules of the High Court is not available in this instance because the Revenue's claim is based on an allegation of fraud – see Order 14 rule 1(2)(b).

On the issue of limitation, the senior federal counsel for the Revenue contends that the additional assessments were properly made in the case as they were assessed pursuant to section 91(3) under which provision assessments can be made at *any time*. He, however, refrained from specifying the para of subsection (3), *i.e.* fraud, wilful default or negligence, on which the Revenue based these assessements. In support of his contention that assessments can be made beyond the 12-year period, the senior federal counsel cited this passage from the Federal Court judgment in *Arumugam Pillai* v. *Government of Malaysia,*[1] in particular at p. 73 where Gill F.J. said:

"In our judgment limitation as such does not apply to any proceedings by the government for the recovery of any tax. This would seem clear from the proviso to section 33(1) of the Limitation Ordinance 1953. Reading section 91 of the Income Tax Act 1967 as a whole it would seem clear that, quite apart from any form of fraud, the words 'within twelve years after its expiration' are irrelevant where there has been any wilful default on the part of a taxpayer in disclosing part of his income for any particular year of assessment."

Mr. Chong, however, contends that by the use of the phrase "quite apart from any form of fraud", the court had excluded the provision in subsection (3) relating to fraud from subsections (1) and (3) and thereby rendered it necessary for the Revenue to prove fraud if they wished to go further than the 12-year period mentioned in section 91.

I am unable to accept this argument. To my mind the words "quite apart" referred to in that phrase merely meant "other than" or "besides". So what was intended here is that besides the normal principle applicable to actions based on fraud which enables certain actions to be commenced after the expiration of the limitation period, section 33 of the Limitation Act would render the 12 years mentioned in subsections (1) and (2) immaterial. In other words, the Revenue's action under section 91 can go beyond any period of limitation by virtue of section 33 of the Limitation Act and alternatively, they can do likewise under section 91(1) and (2) on the basis of wilful default and negligence or by establishing fraud to postpone limitation. There is no indication here that the Revenue is going beyond the 12-year period on the basis of fraud.

Next, it was contended that Order 14 is inapplicable in actions involving fraud. The word "fraud" did not appear in the Revenue's statement of claim nor in any of the supporting affidavits filed in the subsequent Order 14 application. In fact, the term used by the Revenue in para 7 of its statement of claim is that the defendant had "failed and neglected to pay the plaintiff". It is obvious from these words that their claim is based on "negligence" under section 91(3)(b) and not fraud. Negligence and fraud are two separate and distinct terms. Fraud may contain some elements of negligence but negligence is not made up from fraud.

As the documentary evidence before me ostensibly and incontrovertibly negates the allegation that the Revenue's claim was based on fraud, I do not consider it necessary to go further into the consequential effect of fraud on Order 14 in revenue law.

The appeal therefore fails on both grounds. There is one other matter which merits our comment. I was told by Mr. Chong that the taxpayer appealed to the Special Commissioners in March 1985 and until today no hearing date has yet been fixed. He accordingly urged me to exercise my inherent power to stay proceedings until the matter has been disposed of by the Commissioners. Encik Shaharuddin, the senior federal counsel who appeared for the Revenue, initially opposed this application on the ground that I have no such power, but in keeping with the true tradition of the bar he had subsequently retracted this proposition but, nevertheless, urged me not to exercise this exceptional remedy. Fairness and fair play have always been the paramount precept in the dispensation of law in this country. A party which insists on his strict legal rights to immediate payment of contestable sums is morally bound to see that the other party be not placed in financial hardship.

I make no order on this particular prayer but should the hearing date remain unfixed after this appeal, the taxpayer can always initiate the appropriate proceedings for an order of mandamus in this court for a just remedy. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Koh Kim Leng & Co.*